

No. 87-1499

**In the Supreme Court of the United States**

OCTOBER TERM, 1987

W. STERLING ANDERSON AND RONALD CLEMENT BISHOP,  
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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### QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that petitioners' general objection to any conscious avoidance instruction did not constitute an adequate objection to the specific wording of the instruction that was actually given.

2. Whether the language used in the conscious avoidance instruction constituted plain error.



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## **OPINION BELOW**

The opinion of the court of appeals (Pet. App. A1-A4) is unreported.

## **JURISDICTION**

The judgment of the court of appeals (Pet. App. A5) was entered on September 15, 1987. A petition for rehearing was denied on January 6, 1988 (Pet. App. A6-A7). The petition for a writ of certiorari was filed on March 7, 1988 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **STATEMENT**

Following a jury trial in the United States District Court for the District of South Carolina, petitioners were convicted of conspiracy to commit wire fraud and to submit

false statements to federally insured financial institutions, in violation of 18 U.S.C. 371. Petitioner Anderson was also convicted on ten counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of submitting a false statement to a federally insured financial institution, in violation of 18 U.S.C. 1014.<sup>1</sup> Petitioner Bishop was convicted on six counts of submitting false statements to a federally insured financial institution. Anderson was sentenced to concurrent terms of five years' imprisonment on the conspiracy count and on four of the wire fraud counts, to be followed by concurrent terms of two years' imprisonment on the remaining counts. Bishop was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals affirmed (Pet. App. A1-A4).

1. The evidence at trial is not in dispute (see Pet. 3-8). Briefly, it showed that Anderson was the owner and president of A & M Mobile Homes in Spartanburg, South Carolina. Bishop, Anderson's brother-in-law, worked in A & M's office. In early 1982 a mobile home manufacturer offered A & M kickbacks on a group of 100 or more trailers. The manufacturer provided A & M with invoices for the trailers that exceeded the dealer's actual price by \$1,000 to \$2,000 on each mobile home. A & M submitted the inflated invoices to financial institutions that provided "floor financing" for the mobile homes.<sup>2</sup> In that way, the company financed the homes for more than it paid the manufacturer for them. C.A. App. 49-62, 90-91, 373-374, 1006, 1184. Based on the inflated invoices, A & M received

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<sup>1</sup> Petitioner Anderson was acquitted on five false statement and four wire fraud counts.

<sup>2</sup> "Floor financing" allows the dealer to pay for and keep vehicles in stock pending sale without tying up the dealer's finances. The dealer pays interest on the money and repays the loan when the mobile home is sold.

an excess of approximately \$136,000 in floor financing over the amount that it paid for the mobile homes (*id.* at 57, 318, 1183-1184).

Many of the mobile homes were old models or were in poor shape and thus difficult to sell. Identifying plates on some of the homes were fraudulently altered to indicate that they were newer models. C.A. App. 49-51, 56, 158-162, 502, 1005-1006, 1203-1204. Anderson knew of those alterations (*id.* at 159-160, 303, 501-502, 1203-1204). To handle the increased inventory, Anderson hired several additional salesmen and encouraged them to do whatever was necessary to sell the mobile homes, including giving false information to lending institutions so that prospective purchasers could obtain financing (*id.* at 70, 105-106, 305-307, 479-483, 810-811, 1012, 1193). For customers who could not otherwise obtain a loan, A & M salesmen created fictitious credit references and employment, withheld information about bad credit history, inflated the buyers' incomes, and inflated the down payments that they made. A & M also created fictitious bank deposit slips to document the inflated down payments. *Id.* at 110-111, 116-117, 121-123, 135, 145-147, 151-153, 156, 483, 589-641, 819-832, 842, 1011-1018, 1023, 1092, 1137-1139, 1185-1186, 1295-1296, 1336-1337.

Two lending officials from different financial institutions testified that they informed Anderson that A & M salesmen were falsifying credit documents. Anderson told the officials that he did not allow that and would put a stop to it. C.A. App. 404-412, 446-447. Contrary to his protestations, however, the evidence established that Anderson was aware of and encouraged the fraudulent loan applications (*id.* at 117-118, 122, 135, 137, 142-143, 145, 165-166, 308, 488-490, 570-571, 599, 605, 613-619, 633-634, 640, 737, 769-771, 803-804, 814-815, 817-818,

843, 853, 858, 860, 995, 998, 1012, 1014-1015, 1093, 1133-1134, 1187, 1193, 1212, 1300, 1321). Bishop actively assisted in the preparation of fraudulent documents (*id.* at 148-149, 151-153, 298, 300-301, 495, 503, 507, 595-597, 830, 832, 845, 856, 1018, 1095, 1142, 1328, 1599-1620).

2. At trial, petitioners did not dispute that fraudulent loan applications were filed with the lending institutions. They contended, however, that they did not know that the information contained in the applications was false. Anderson testified that he did not know of or participate in the fraudulent activities (*e.g.*, C.A. App. 1734-1738, 1753, 1756, 1764, 1825-1831). He claimed that his involvement in political activities and in an unrelated criminal investigation and prosecution distracted him from his expanding business responsibilities at A & M (*id.* at 1715-1717, 1739-1741, 1750-1754). Bishop, who did not testify at trial, suggested through his cross-examination of Anderson that he was not in a position to verify the information that he passed along in the course of his clerical and bookkeeping duties (*id.* at 1833-1852).

In light of petitioners' defense that they did not have actual knowledge that false information was being filed with the lending institutions, as well as evidence that Anderson told some salesmen that he did not want to know about their illegal activities (C.A. App. 490, 1321-1322), the government requested a jury instruction on conscious avoidance of the truth. Anderson objected to the court's giving any conscious avoidance instruction, however phrased, on the ground that such an instruction would "negate[] the element of intent" (*id.* at 2161, 2162). Bishop objected, without further amplification, that "the language as written in this proposed instruction negates the intent necessary to constitute a violation of these particular statutes" (*id.* at 2174). The court responded: "Let's

see how it comes out in the charge. If you're not satisfied, you're free to take exception to it" (*id.* at 2175). The court then instructed the jury (*id.* at 2374; see also Pet. App. A2-A3) as follows:

Guilty knowledge cannot be established by demonstrating mere negligence or even foolishness on the part of a defendant. However, it is not necessary that the government or prosecution prove to a certainty that the defendant knew that fraudulent statements concerning loan applications were being submitted to various financial institutions. The element of knowledge may be satisfied by proof that the defendant acted with deliberate disregard of whether fraudulent loan applications were being prepared and submitted and with conscious purpose to avoid learning the truth, unless he actually believed that the statements in the applications were true.

Following the jury charge, petitioners again objected to the fact that the court gave a conscious avoidance instruction, but they did not take issue with any specific language used in the instruction or suggest a more acceptable formulation (C.A. App. 2397-2399).

3. On appeal, petitioners dropped their objection to the fact that the trial court gave a conscious avoidance charge (see Appellants' C.A. Br. 17). Instead they contended that the instruction the court gave was fatally flawed in two respects. First, they claimed that the instruction did not require the jury to find a "high probability" that petitioners were actually aware of the existence of a scheme to submit false financial statements to the lending institutions. Second, they argued that the instruction diluted the reasonable doubt standard and shifted the burden of proof to petitioners. The court of appeals found that petitioners' specific objections to the wording of the

instruction were not made to the district court and that petitioners accordingly waived those challenges. The court explained that it was "here presented with a classic case where the failure to object with sufficient precision denied the district court the opportunity to correct the charge" (Pet. App. A4). After examining the charge given by the trial court, the court of appeals concluded that "there was no plain error which would require reversal even in the absence of a proper objection by the defendants" (*id.* at A3-A4).

#### ARGUMENT

1. Petitioners contend (Pet. 39-41, 45-55) that the court of appeals erred when it applied the plain error standard to review their challenge to the conscious avoidance charge. They claim that their general objection to the conscious avoidance charge was sufficient to apprise the trial court of their reservations concerning the wording of the instruction that was actually given. All the courts of appeals agree, however, that a general objection to the fact that an instruction is to be given does not preserve a challenge to the particular wording of the charge. See, e.g., *United States v. Glenn*, 828 F.2d 855, 862 (1st Cir. 1987); *United States v. Lanza*, 790 F.2d 1015, 1021 (2d Cir.), cert. denied, 479 U.S. 861 (1986); *United States v. Cardinal*, 782 F.2d 34, 36 (6th Cir.), cert. denied, 476 U.S. 1161 (1986); *United States v. Markowski*, 772 F.2d 358, 363 (7th Cir. 1985), cert. denied, 475 U.S. 1018 (1986); *United States v. Marbury*, 732 F.2d 390, 403-404 (5th Cir. 1984); *United States v. Glick*, 710 F.2d 639, 643 (10th Cir. 1983), cert. denied, 465 U.S. 1005 (1984). There is therefore no conflict among the circuits on the question whether petitioners' objections were sufficient to preserve their challenge to the content of the conscious avoidance

charge. In any event, the factbound question of whether petitioners' general objections were sufficient to preserve their present complaints does not warrant review by this Court.

Rule 30, Fed. R. Crim. P., states that "[n]o party may assign as error any portion of the charge \* \* \* unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Petitioners' objections during the trial can only be viewed as objections to the court's giving any conscious avoidance charge at all (see C.A. App. 2161-2162, 2174, 2397, 2398-2399). On appeal, however, petitioners did not dispute that a conscious avoidance charge was proper in the circumstances of this case. See Appellants' C.A. Br. 17 (emphasis in original) ("The issue presented in this appeal is not the use per se of the conscious avoidance instruction, but rather the appropriate *form* of that instruction."). Yet while petitioners sought to challenge the "form" of the instruction on appeal, they made no objection on that ground at trial. Nor did they offer any curative language of their own such as they now propose.

As the court of appeals recognized (Pet. App. A4), petitioners' "failure to object with sufficient precision denied the district judge the opportunity to correct the charge." Under these circumstances, petitioners' present objections to the charge were not preserved at trial and the court of appeals therefore properly reviewed the challenged instruction only for plain error. See Fed. R. Crim. P. 52(b).<sup>3</sup>

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<sup>3</sup> Petitioners complain (Pet. 44) that the court of appeals did "an enormous disservice to the judicial system as well as these individual petitioners" by failing to pass first upon the propriety of the instruction given by the trial court before applying the plain error doctrine in affirming petitioners' convictions. Despite petitioners' unsupported

2. Petitioners contend that the conscious avoidance charge given by the trial court was "so seriously defective" (Pet. 55) that it "undermined the fundamental fairness of petitioners' trial" (Pet. 56). As they did in the court of appeals, petitioners argue that the content of the instruction was defective in two respects. First, the instruction did not contain language requiring the jury to find that "the defendant was aware of a high probability of the fact in issue unless he believed that it did not exist" (Pet. 26). Second, the instruction did not "require[] the jury to find beyond a reasonable doubt that the defendant acted with a conscious purpose to avoid the truth" and thus "could lead to confusion as to the government's burden of proof" (Pet. 28). In addition, petitioners contend (Pet. 35-39) that the conscious avoidance instruction was erroneously applied to the conspiracy count as well as to the substantive counts. None of these complaints, however, rises to the level of plain error.

a. Petitioners contend (Pet. 15-23) that the courts of appeals are in disarray on the appropriate wording of a conscious avoidance instruction. In particular, petitioners note that the Second and Ninth Circuits have held that such an instruction should include language requiring that the defendant be aware of the "high probability" that the fact at issue is true. See *United States v. Aulet*, 618 F.2d 182, 191 (2d Cir. 1980); *United States v. Valle-Valdez*, 554 F.2d 911, 914 (9th Cir. 1977); *United States v. Jewell*, 532 F.2d 697, 704 n.21 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976). Other circuits have not required such language, see, e.g., *United States v. Deveau*, 734 F.2d

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claim (Pet. 43) that it is "only logical" to proceed in this order, however, there is no requirement that the court of appeals do so. Because it is clear that the charge given did not amount to plain error, a discussion of the merits of the charge would have been dictum that would not necessarily have bound the court of appeals in future cases.

1023 (5th Cir. 1984), cert. denied, 469 U.S. 1158 (1985), although some have recommended it, see *United States v. Manriquez Arbizu*, 833 F.2d 244, 250 (10th Cir. 1987). While there is some disagreement among the circuits as to the precise verbal formula to be used in a proper conscious avoidance charge, that issue is not presented in this case since petitioners never objected to the charge on that ground.

There is no circuit conflict on the question actually presented, which is whether the absence of the language petitioners now propose constitutes plain error. Even in those circuits that have required "conscious avoidance" instructions to contain language regarding the defendant's awareness of the "high probability" that the fact in dispute was true, the courts have held that the failure to use that language does not constitute plain error. See, e.g., *United States v. Eaglin*, 571 F.2d 1069, 1074-1075 (9th Cir. 1977), cert. denied, 435 U.S. 906 (1978); *United States v. Jewell*, 532 F.2d at 704 n.21; *United States v. Dozier*, 522 F.2d 224, 228 (2d Cir.), cert. denied, 423 U.S. 1021 (1975). See also *United States v. Glick*, 710 F.2d 639, 643-644 (10th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); *United States v. Cincotta*, 689 F.2d 238, 243-244 (1st Cir.), cert. denied, 459 U.S. 991 (1982). Nor do petitioners suggest any reason why the absence of such language—which was in any event implicit in the requirement that the jury find that "the defendant acted with *deliberate* disregard of whether fraudulent loan applications were being prepared and submitted" (Pet. App. A3 (emphasis added))—"undermined the fairness of the trial and contributed to a miscarriage of justice." *United States v. Young*, 470 U.S. 1, 17 n.14 (1985).<sup>4</sup>

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<sup>4</sup> Although the charge in this case did not contain the "high probability" language on which petitioners focus their present complaint, it was carefully balanced in other respects. It emphasized at the outset

b. Contrary to petitioners' contention, the conscious avoidance instruction given by the trial court did not shift the burden of proof to petitioners or dilute the requirement of proof beyond a reasonable doubt. See *United States v. MacKenzie*, 777 F.2d 811, 818-819 (2d Cir. 1985), cert. denied, 476 U.S. 1169 (1986); *United States v. Ciampaglia*, 628 F.2d 632, 642 (1st Cir.), cert. denied, 449 U.S. 956 (1980). The district court extensively and repeatedly instructed the jury on the government's obligation to prove each element of each offense beyond a reasonable doubt (C.A. App. 2337-2338, 2343, 2347, 2359, 2360, 2361, 2363, 2364, 2367, 2368, 2370, 2371, 2373, 2376-2377, 2379, 2383, 2386, 2403). The court also repeatedly made clear that the burden of proof rested entirely with the government (*id.* at 2338, 2361, 2365-2368, 2370, 2373, 2379, 2386, 2402-2404).

Viewing the court's instructions as a whole, see *Cupp v. Naughten*, 414 U.S. 141, 147 (1973), there is no possibility that the jury could have failed to understand that the prosecution bore the burden of proving petitioners' guilt as to each element of every offense beyond a reasonable doubt. Indeed, immediately before giving the conscious avoidance charge, the district court reminded the jury that "there are four essential elements which the prosecution

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that negligence or foolishness was not sufficient to establish knowledge; it required that the proof of conscious avoidance show "deliberate disregard" and "conscious purpose to avoid learning the truth;" and it added that even in such cases, petitioners could not be convicted if the jury found that they actually believed that the statements in the loan applications were true. In these respects, the charge given in this case was significantly more balanced and favorable to petitioners than the charge that the Second Circuit criticized in *United States v. Morales*, 577 F.2d 769, 774-775 & n.4 (1978).

must prove beyond a reasonable doubt in order to establish the offense prohibited by Section 1014" (C.A. App. 2373). After setting forth the elements, including the requirement that the false statement be made knowingly and intentionally (*id.* at 2373-2374), and after explaining that materiality is a question of law not to be considered by the jury (*id.* at 2374), the court gave its instruction on conscious avoidance (*ibid.*). In light of the context, it is unrealistic for petitioners to speculate (Pet. 29) that "[t]he trial judge's failure to include the reasonable doubt language" within his three-sentence charge on conscious avoidance "could have caused the jury to assume that with respect to conscious avoidance, the government's burden is somehow different and perhaps less."

c. Petitioners mistakenly contend (Pet. 35-39) that the district court gave the conscious avoidance instruction in connection with the conspiracy count as well as the substantive counts. In fact, the district court carefully separated its instructions on the conspiracy count and the substantive counts. After concluding the conspiracy charge the court stated: "[T]hat finishes my charge as to the conspiracy count. \* \* \* Does anyone feel you would like to take a break at this time? I'm going to have to charge you about the essential elements of the substantive counts of the indictment" (C.A. App. 2368). The court then continued, "I'm leaving my charge on the conspiracy count and will now talk about what we call substantive counts" (*id.* at 2369).

The conscious avoidance instruction was then given in connection with the substantive counts, immediately after the court outlined the elements of 18 U.S.C. 1014 (C.A. App. 2373), and immediately before an aiding and abetting instruction related to the substantive counts (*id.* at

2374). Shortly thereafter, in the context of a *Pinkerton* charge (see *Pinkerton v. United States*, 328 U.S. 640 (1946)), the court again made clear that it was discussing only the substantive counts and that its instructions on conspiracy had been concluded (C.A. App. 2376-2377, 2382).

Even if the court had made the conscious avoidance instruction applicable to the conspiracy count, however, that would not be error, since the degree of knowledge required for the fact at issue is the same for conspiracy as for the underlying substantive offense. See, e.g., *United States v. Ditommaso*, 817 F.2d 201, 218-219 (2d Cir. 1987); *United States v. Kehm*, 799 F.2d 354, 362 (7th Cir. 1986); *United States v. Reed*, 790 F.2d 208, 211 (2d Cir.), cert. denied, 479 U.S. 954 (1986); *United States v. Lanza*, 790 F.2d at 1022-1023; *United States v. Knight*, 705 F.2d 432, 434 (11th Cir. 1983). In any event, it would certainly not be plain error, which is the applicable standard of review in light of petitioners' failure to object to the instruction on that ground.

### CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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